The ground on which the pile was placed sloped toward neighboring houses, one of which was that of the plaintiff. A portion of the material suddenly gushed out from the bottom of the pile, crossed the highway and carried away several of the houses for a distance of about fifty feet, but the plaintiff's property was not touched. The plaintiff claimed damages because the existence of the pile near his premises, with the danger of a recurrence of the slide, had substantially diminished their market value. He recovered a judgment in the court below. *Held,* that the judgment was erroneous, since the plaintiff had no cause of action until physical injury to his property occurs. *Johnson v. Rouchleau-Ray Iron Land Co.* (1918, Minn.) 168 N. W. 1.

See COMMENTS, p. 171.

TROVER AND CONVERSION—LIABILITY OF INNOCENT AGENT—TRANSFER OF NEGOTIABLE PAPER.—Negotiable instruments payable to bearer were stolen from the plaintiff. An agent of the thief delivered them to the defendants, who were bankers, and authorized their sale. The defendants sold them and after deducting their commission paid the proceeds to the agent, who paid them over to his principal. Throughout the transaction the defendants acted without notice, actual or "constructive," of the plaintiff's interest. The plaintiff brought an action for conversion. *Held,* that the acts of the defendants did not amount to a conversion. *Pratt v. Higginson* (1918, Mass.) 119 N. E. 661.

See COMMENTS, p. 175.

TRUSTS—RESULTING AND CONSTRUCTIVE TRUSTS—GRANTEE'S ORAL AGREEMENT TO HOLD LAND FOR PERSON PAYING PURCHASE PRICE.—The complainant's bill alleged that he paid the purchase price of certain real estate, the title to which was conveyed to the defendant, and that the latter expressly agreed and declared that she held the property in trust for him. *Held,* that the plaintiff had no enforceable equitable interest in the property. *Keown v. Keown* (1918, Mass.) 119 N. E. 785.

The decision follows previous Massachusetts cases in seeing nothing but the express oral trust, the enforcement of which is forbidden by the statute of frauds. The English law and that of some American states is to the contrary, taking the view that there is a "resulting trust" in favor of the buyer. *Dyer v. Dyer* (1788, Ex.) 2 Cox, 92; *Stock v. McAvoy* (1872) L. R. 15 Eq. 55; *Cook v. Patrick* (1891) 135 Ill. 499, 26 N. E. 658. As the cases just cited show, this so-called "resulting trust" is based upon a presumption of fact, "rebuttable" by evidence. *Cf.* (1918) 27 YALE LAW JOURNAL, 705. The result is that in the end, where evidence is introduced, it is really the express oral trust which is enforced. This seems clearly to violate the statute of frauds, and to this extent the Massachusett view seems sound. There is, however, another possibility which is usually entirely overlooked by the courts. In other parts of our law we have acted upon the general principle that, while one may set up the statute of frauds as an excuse for refusing to perform the obligations resulting from an express oral promise, if he does so he will not be permitted to enrich himself thereby in an unjust way. In consequence he is usually required to restore, either specifically or by way of money equivalent, that which he received in consideration for the oral promise. Keener, *Quasi-contracts,* 277; Woodward, *Quasi-contracts,* 147. It happens occasionally under this doctrine that the plaintiff actually obtains the same relief that he would have been entitled to had the oral promise been enforceable, but this is merely a coincidence and no reason for refusing to apply the general principle. Thus, if services are performed

under an agreement within the statute of frauds, the one performing them may recover their reasonable value in a quasi-contractual action. In some jurisdictions the agreed price may be used as evidence of the value of the services. *Scarisbrick v. Parkinson* (1869, Ex.) 20 L. T. N. S. 175; Keener, *op. cit.*, 290; *contra, Hillebrands v. Nibbelink* (1879) 40 Mich. 646. If the jury find the reasonable value to be the contract price—as is not infrequently the case—no one imagines that the contractual rather than the quasi-contractual duty is being enforced. Obviously this general principle applies to situations like that in the principal case. It is unconscionable that one who has paid nothing and who has acquired property upon an express oral agreement to hold it for others should be allowed both to break his promise and to keep the property. To compel surrender of the latter is not to enforce the express oral trust, for *non constat* that the terms of the oral trust are identical with the constructive obligation to convey to the one paying the purchase price. In some cases they would be, in others not. In any event, if they were identical, it would be a mere dramatic coincidence. In many states there are statutes which affect the matter. These are collected and discussed, together with the cases, in Ames, *Lectures on Legal History*, 431-434. *Cf.* also the Comment upon *Constructive Trusts Arising upon Breach of Express Oral Trusts of Land* (1918) 27 YALE LAW JOURNAL, 389, also CURRENT DECISIONS, *infra.*

WILLS—CONSTRUCTION—LEGACY TO "CHILD" OF TESTATOR'S SON DOES NOT INCLUDE ADOPTED CHILD.—The testator was survived by his son, S, who was married but without children. The will gave a legacy, upon the death of S, "to his child or children and their heirs," with a gift over to residuary legatees in case S left no child. After the testator's death S legally adopted a child. *Held,* that the legacy belonged to the residuary legatees. *In re Puterbaugh's Estate* (1918, Pa.) 104 Atl. 601.

It would seem that the court was justified under the circumstances in ascribing to the word "child" its primary and popular meaning. See *Lichter v. Thiers* (1909) 139 Wis. 481, 121 N. W. 153. Had the adoption been prior to the testator's death, the adopted child might in some circumstances have been construed as intended by the testator to be included within a legacy to "children." *In re Truman* (1905) 27 R. I. 209, 61 Atl. 598. An adopted child has been permitted to take under a devise to the "heirs at law" of the testator's daughter, even though the statute for adoption was enacted after the testator's death. *Smith v. Hunter* (1912) 86 Oh. St. 106, 99 N. E. 91. But the weight of authority is believed to be *contra. Wyeth v. Stone* (1887) 144 Mass. 441, 11 N. E. 729; *Brown v. Wright* (1907) 194 Mass. 540, 80 N. E. 612. Similarly, under statutes which avoid the lapsing of a legacy to a relative of the testator, when the legatee dies before the latter, there is a conflict of authority whether an adopted child can take the legacy given to his foster parent and so prevent the lapse. *Phillips v. McConica* (1898) 59 Oh. St. 1, 51 N. E. 445 (holding he does not); *Warren v. Prescott* (1892) 84 Me. 483, 24 Atl. 948 (holding he does).